UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

SMYRNA READY MIX CONCRETE, LLC

and

GENERAL DRIVERS, WAREHOUSEMEN AND HELPERS, LOCAL UNION NO. 89, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS

Cases 09-CA-251578
09-CA-252487
09-CA-255573
09-CA-258273

COUNSEL FOR THE GENERAL COUNSEL'S REPLY BRIEF AND OPPOSITION TO MOTION TO STRIKE

I. INTRODUCTION:

On November 23, 2020, Respondent filed an answering brief and motion to strike in response to the Counsel for the General Counsel's cross-exceptions. Counsel for the General Counsel, pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board, respectfully submits this reply brief in the above cases.

II. LEGAL ANALYSIS:

A. The Motion to Strike Should Be Denied.

In its answering brief in response to Counsel for the General Counsel's exceptions, Respondent contends that the General Counsel's cross-exceptions should be disregarded because they did not provide "precise citations" and thus "unduly prejudice[d] Respondent's ability to provide a meaningful response." As an initial matter, Respondent does not provide any evidence in support of its claim that it was prejudiced, and indeed it did file a 13- page substantive answering brief to the General Counsel's cross-exceptions. Thus, Respondent did provide a meaningful response to the cross-exceptions, and it has failed to show that it was prejudiced in any way. Additionally, Respondent misleadingly cites to the Board's rules on the content of

cross-exceptions. The Board is not required to disregard exceptions that do not include citations to the portions of the record relied on. 29 C.F.R. Sec. 102.46(C)(1)(ii).

Moreover, Respondent ignores that the General Counsel's cross-exceptions are not primarily based on evidence ignored by the Administrative Law Judge. Rather, the General Counsel's cross-exceptions generally accept the Administrative Law Judge's factual conclusions, and except to the legal conclusions drawn based on the administrative record. Thus, citations to the transcript would be redundant. Given the above, the General Counsel instead correctly precisely cited to the Administrative Law Judge's Decision in support of its cross-exceptions. Nevertheless, additional citations to the transcript are included herein. Tellingly, Respondent has not cited to even a single Board case in support of its claim that the General Counsel's cross-exceptions should be struck or disregarded. The General Counsel's exceptions have merit and Respondent's motion to strike the cross-exceptions should be denied.

B. The Administrative Law Judge Erred in Failing to Find that General Manager Ben Brooks Telling Employees They Would No Longer Be Required to Travel to Florence, KY is a violation of the Act.

In its answering brief, Respondent contends that the Administrative Law Judge correctly found that General Manager Ben Brooks's statement to the Winchester drivers that they would not have to drive to Florence as frequently as before was not a violation of the Act. As an initial matter, Respondent maintains that several drivers testified that Brooks did not promise them they would never have to go to Florence. This is misdirection. The witnesses did not deny that that Brooks made such a statement. All drivers testified at the very least, that they were told they would not have to go to Florence as often. (Tr. 189, 434, 559, 758) Respondent's own witness, Brooks, admitted that he told employees they would not have to travel to Florence as much after the November 15, 2019 meeting. (Tr. 1111) Brooks admitted knowing that traveling to Florence

was a concern that employees had prior to the November 15, 2019 meeting. (Tr. 1088) Whether the drivers were told they would have to travel to Florence less, or would not have to all, is irrelevant – both would amount to a promise of benefits based on concerns Brooks knew were leading the employees toward unionizing.

Respondent further maintains that the ALJ concluded that trips to Florence were not the genesis of the campaign. He said no such thing. Respondent has not cited to any such finding by the Administrative Law Judge. The Administrative Law Judge correctly concluded that the evidence regarding Florence is relevant as background. (ALJD p. 8) The genesis of the union organizing is indeed background to this case, and the record evidence establishes that the trips to Florence were a genesis of the union organizing campaign. (ALJD 11-12; Tr. 43-45, 51, 55, 114, 120-121, 179-181, 294-295, 383-384, 421-422, 429, 490; G.C. Ex. 6) Management was aware that trips to Florence were a major concern to employees. (ALJD 12; Tr. 180, 1088) Thus, as the General Counsel has already noted in the cross-exceptions, Brooks's promise to reduce or altogether remove the trips to Florence would not have been lost on employees, and would have been effective at quelling unionization efforts.

Respondent relies on Brooks's self-serving statement that Respondent had hired more employees in Florence and that he did not have control over the hiring decisions at the Florence plant to attempt to prove that Brooks did not have an unlawful motive in making the promise of benefits. Respondent provided no evidence beyond Brooks's bare assertions that Florence had hired more drivers. There is no evidence about when and under what circumstances those drivers were supposedly hired. [1/] Moreover, even if Respondent had hired more employees in Florence as part of the effort to remedy employees' grievances, doing so in order to remedy

employees' grievances at the Winchester plant and quash support for organizing violates the Act. Respondent also ignores that Brooks could have called the CEO or Florence Business Manager and asked them to hire more drivers, or could have sent drivers from a plant other than Winchester to assist in Florence in order to assuage the growing discontent in Winchester. He did not have to have hiring authority in Florence to make unlawful promises of benefits to employees in Winchester. Brooks's bare assertions with no support are insufficient to show a non-discriminatory business reason or motive in light of the promise of benefits, at the heels of an unlawful discharge of the head union organizer and in the midst of other unlawful acts and statements. The evidence supports that Brooks' presence and statements at the November 15, 2019 meeting were for the purpose of quashing the organizing drive and consequently violate the Act.

C. The Administrative Law Judge Erred in Failing to Find that Respondent Giving Employees $100 is a Violation of Section 8(a)(3) of the Act.

In its answering brief, Respondent contends that even though the Administrative Law Judge found that Respondent violated Section 8(a)(1) of the Act in giving employee $100, the Administrative Law Judge's failure to specifically address whether giving employees $100 is a violation of Section 8(a)(3) of the Act is "because there is no basis for liability on this claim." To the extent that Respondent's arguments in this respect are essentially identical to its arguments in its exceptions arguing that the Administrative Law Judge erred in determining that Respondent violated Section 8(a)(1) of the Act, the General Counsel has already addressed Respondent's 8(a)(1) arguments in its answering brief to Respondent's exceptions.

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[1]/ To the extent that Respondent relies on its truck delivery reports to show that Respondent hired more drivers, and that Winchester drivers did not have to travel to Florence as a result of those hires, the Administrative Law Judge correctly discredited those reports. (ALJD 11-12)

Respondent maintains that *Clock Electric*, 338 NLRB 806 (2003) and *Holly Farms, Corp.*, 311 NLRB 273 (1993), cited by the General Counsel to support a violation of Section 8(a)(3) of the Act, are distinguishable from the present case. Both cases are relevant and applicable. While Respondent acknowledges that the facts of both *Clock Electric* and *Holly Farms Corp.* are similar to this case in that both involve the unlawful grant of wage increases during a union organizing campaign, Respondent maintains this case is distinguishable because the benefits granted here were not given during the "critical period." The critical period is relevant only to representation cases, and there is no such case here. Tellingly, there is no discussion of the critical period in *Clock Electric* at all because it was irrelevant to finding a violation of Section 8(a)(3) of the Act. The discussion of the critical period in *Holly Farms* was included only because it also included a decertification case. Respondent's raised distinction is therefore meaningless. Respondent is correct that no petition was ever filed, no union authorization cards were collected, precisely because it unlawfully nipped the organizing drive in the bud as correctly recognized by the Administrative Law Judge. Respondent violated Section 8(a)(3) of the Act as alleged in the complaint.

Respondent further maintains it did not have knowledge of the organizing campaign prior to giving the $100 bonuses and there is thus no violation of the Act. Respondent's knowledge is already discussed at length in the General Counsel's answering brief to Respondent's exceptions. Respondent's own witness Newell testified that on about November 8, 2019, he overheard employee Nicole Long talking to Mechanic Jeff Rod and Plant Manager/Batch Man Roy Chasteen at Respondent's Georgetown plant discussing an employee-only meeting and reported it to Brooks. (Tr. 1093-1094, 1097, 1349-1350, 1388, 1413-1414) Brooks told Newell he would "find out" what it was about when he got to Winchester. (Tr. 1094) Later that same day, Brooks

visited the Winchester plant. (Tr. 60, 748-749, 1092-1093) Brooks informed Plant Manager Aaron Highley that employees had met with a union the previous evening. (Tr. 749-750) After stating that he would investigate further, Brooks asked Highley to provide him with names of employees involved with the union effort. (Tr. 750, 753) Brooks then searched for union supporters, spoke with Plant Manager Jason Stott, and terminated the lead union organizer. (Tr. 749-750, 1097-1099, 1183-1184) After terminating Copher, Brooks told Highley, "we are not going to try to run a company with our hands tied behind our back. I will shut this plant down first." (Tr. 751-52) The weight of all of the evidence above, including Newell's and Highley's testimony about Brooks's statements and actions on November 8, 2019, supports the ALJ's determination that Brooks was aware of the nascent union organizing drive.

Respondent maintains that it has established by a preponderance of the evidence that it would have given employees $100 in the absence of any actual or suspected union activity. This argument is also already addressed in the General Counsel's answering brief to Respondent's exceptions. Respondent's own witness, Brooks, admitted that he doesn't always give employees $100 at safety meetings. (Tr. 1197) He admitted he never gave employees at Winchester cash bonuses before. (Tr. 1197-1198) He admitted he had never given any bonuses to employees at Winchester's sister plants. (Tr. 1197-1199) He did not give bonuses to employees at the sister plant in November 2019 when he gave bonuses to its Winchester employees. (1197-1198) Additionally, many of the meetings at which Brooks did issue cash bonuses, were meetings with management, not employees, and therefore do not establish a past practice regarding bonuses being given to employees. (Tr. 1490, 1198)

There is ample evidence to support the fact that Respondent harbored anti-union motivation for granting the cash bonus to employees on November 15, 2019. The ALJ correctly

found that Brooks had fired lead organizer Sunga Copher just one week earlier. Brooks also told Highley he would rather shut the plant down than run it unionized (a threat which he later carried out). The Winchester employees could not have missed the inference that the source of this cash bonus would also be the source from which future benefits must flow and which may dry up if not obliged. The unlawful motive is bolstered by Brooks' admission that the bonus was given as a "morale booster," or a "hundred dollar handshake," and the fact that he had never given such a cash bonus to employees at Winchester before. (Tr. 47, 186-187, 307, 434, 1111-1112, 1197) In short, Respondent cannot establish a lawful reason for the bonuses, or a past practice of doing so. Its' actions in granting the bonuses were unprecedented to the employees at Winchester, and as such were unlawful. They were efforts to discourage organizing and unionization, and they amount to not just violations of Section 8(a)(1) of the Act as found by the judge, but also violations of Section 8(a)(3) of the Act.

D. The Administrative Law Judge Erred in Failing to Grant a Notice Remedy.

In its answering brief, Respondent contends that the Administrative Law Judge correctly failed to order a notice reading remedy. In support, Respondent cites to several circuit court opinions criticizing or failing to enforce a notice reading remedy. Notably, Respondent made no effort to distinguish any of the cases cited by the General Counsel in support of its contention that a notice remedy is warranted. Indeed, Respondent failed to cite even a single Board case establishing that a notice reading remedy is inappropriate in cases such as this one. Every single circuit court case failing to enforce a notice reading requirement cited by Respondent actually followed a Board case requiring a notice reading.

To the extent that Respondent relies on circuit court cases failing to enforce a notice reading requirement, *Denton Cnty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 174 (5th Cir. 2020)

is from the 5th Circuit and is inapplicable to this case, which arises in Winchester, Kentucky, within the 6th Circuit. Moreover, *Denton Cnty*. involved far less serious infractions than those in this case: they involved a failure to give raises and blaming the Union for the lack or raises. The Fifth Circuit specifically stated they were not enforcing the order because it was not as egregious as other cases in which they had upheld a public notice reading order in the past. The scope of Respondent's unfair labor practices here include a discharge of the lead union supporter for his union or protected concerted activity, a discharge of a supervisor for refusing or failing to commit an unfair labor practice, and because he was related to a union supporter, giving employees bonuses to discourage them from engaging in union or other protected concerted activities, changing the status of the plant to an on-demand facility and in doing so, discharging the remainder of the drivers at the facility, soliciting grievances from employees and impliedly promising to remedy them in order to discourage employees from supporting union organizational activity, and requiring employees to sign unlawful separation agreements. Every single driver at the Winchester, Kentucky facility was impacted by these unfair labor practices. Moreover, all of the unfair labor practices were committed by high ranking officials of Respondent, making the need for a notice reading even greater. The unfair labor practices in this case were much more numerous, pervasive, and outrageous, than in *Denton Cnty.* and that case is therefore inapplicable except to show that the Board should follow its precedent of requiring notice readings even for lesser violations than seen here.

Respondent also cites to *Sysco Grand Rapids, LLC v. NLRB*, 835 F. App'x 348, 359 (6th Cir. 2020), which failed to enforce a notice reading remedy, in support of its claim that a notice reading is inappropriate. In *Sysco*, the Board found a notice reading remedy to be appropriate and necessary, and the Board should follow its precedent. Moreover, in failing to enforce the

remedy in *Sysco*, the 6th Circuit relied on the fact that the Board failed to consider how the same evidence that tempered the need for a *Gissel* order – the passage of several years and the turnover of 30% of employees, might undermine the justification for a notice reading. There are no such issues here. To the extent that the 6th Circuit is concerned about first amendment concerns about having an employer representative read the notice, the General Counsel is requesting that the notice be read either by a Respondent representative or a Board agent, so such concerns are also unwarranted.

Finally, Respondent cites to *HTH Corp. v. NLRB*, 823 F.3d, 668 (D.C. Cir. 2016) in support of its proposition that a notice reading is inappropriate here. As an initial matter, in *HTH Corp.*, as in *Denton Cnty.* and *Sysco*, the Board found that the violations in question warranted a notice reading. Moreover, in *HTH Corp.*, inexplicably cited by Respondent in support of its contention that a notice is inappropriate, the D.C. Circuit actually agreed that it was appropriate for the Board to order an employer, or in the alternative a Board agent, to read to its employees the notice acknowledging its severe violations of the NLRA and committing not to engage in such behavior in the future. The Board should do the same here.

As discussed in more detail in the General Counsel's cross-exceptions, the evidence in this case established that there was not just widespread knowledge of Respondent's numerous and egregious unfair labor practices, but that every single driver in the unit, as well as the only supervisor at the plant, was affected by them. The partial closure of the plant is a particularly egregious violation that must be sufficiently remedied through a method more effective than a traditional posting. The Administrative Law Judge erred in not ordering a notice reading to remedy the violations, and the Board should order the notice reading to properly remedy Respondent's unlawful conduct.

III. CONCLUSION:

Based on the record as a whole, and for the reasons referred to herein, Counsel for the General Counsel respectfully submits that the Board should grant Counsel for the General Counsel's cross-exceptions and the decision of Judge Amchan should be reversed insofar as it concludes that Respondent telling employees they would no longer be required to travel to Florence, Kentucky is not a violation of the Act, insofar as it fails to specifically conclude that Respondent giving employees is a violation of Section 8(a)(3) of the Act, and insofar as it fails to grant a notice reading remedy.

Dated: December 7, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

December 7, 2020

I hereby certify that on this date I served the Counsel for the General Counsel's Reply Brief and Opposition to Motion to Strike on the following parties by electronic mail:

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